Schmitz v M & M/Mars 01-35899 /01-35936

FISHER, Circuit Judge, Concurring.

I concur with the majority's conclusion that Schmitz failed to prove his retaliation-based hostile environment claim, although I believe it reads *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998), too broadly.

I am troubled, however, by the majority's de novo analysis of the "sufficiency" of Mars' proffered nondiscriminatory reason for denying Schmitz an interview. As I see it, either (1) the district court's finding that the reason was "insufficient" was actually a finding of pretext, which should be reviewed for clear error, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993); *Trent v. Valley Elec. Ass'n, Inc.*, 195 F.3d 534, 537 (9th Cir. 1999), or (2) the finding that the reason was not pretextual should have ended the matter and any further review of sufficiency was an error of law. Unfortunately, the district court's findings of fact and conclusions of law are not a model of clarity and we are left wondering what the court intended.

The district court might have meant, despite her word choice, that she found Mars' sixth explanation – that it refused to interview Schmitz because he submitted his application on company letterhead – pretextual. Pretext may be shown "indirectly by showing that the employer's proffered explanation is unworthy of credence." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th

Cir. 1998). The district court appeared to find this type of pretext, for instance, in Mars' explanation that it refused to interview Schmitz because he failed to participate in an exit interview when he was initially laid off. Mars had previously interviewed Schmitz for another position despite being aware of this same failure and thus, the explanation was "unworthy of credence." But an employer's proffered reason may also be found pretextual if the plaintiff persuades "the court that a discriminatory reason more likely motivated the employer." *Id.* The district court might have meant that Mars' sixth explanation was not "unworthy of credence" but was insufficient to convince her that discrimination was not the more likely motivation behind Mars' decision. Although mislabeled, this would be a finding of pretext subject to clear error review.[1] *Trent*, 195 F.3d at 537.

However, in light of the district court's explicit statement that Mars had a non-pretextual reason to refuse Schmitz an interview, I cannot strain to interpret the district court as meaning just the opposite. Thus, I take the district court's

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[1] An alternative understanding of the district court's "sufficiency" statement might be that, under a mixed motive analysis, although Mars was motivated by both legitimate and illegitimate reasons, Mars would not have refused to interview Schmitz in the absence of the retaliatory motive. *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 2150 (2003). Such a finding would be reviewed for clear error. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255 (1989). However, from the record I must conclude that the district court proceeded exclusively under the traditional *McDonnel Douglas* model. The district court did not explicitly refer to a mixed motive theory, nor was it argued either in the district court or on appeal.

statement on pretext at face value as a finding that Mars was motivated by a non-discriminatory reason.

Once the district court concluded Mars' explanation was not pretextual, the analysis should have ended. The analysis under Title VII does not inquire into the sufficiency of an employers justification in any sense other than pretext determinations. Accordingly, I cannot join in the majority's de novo review of the sufficiency of Mars' justification. It relies on *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 871 (9th Cir.2001), for the proposition that questions regarding sufficiency of a non-pretextual reason are mixed questions of law and fact. *Nichols*, however, never addressed such "sufficiency" determinations. *Id.* (noting that whether a plaintiff establishes the elements necessary to a sexual harassment or retaliation claim is a mixed question of law and fact). On the other hand, to the extent the majority's "sufficiency" analysis is actually a de novo review of whether Mars' justification was pretext, de novo review is inappropriate. Findings of pretext are pure questions of fact, which we must review for clear error. *Hicks*, 509 U.S. at 524; *Trent*, 195 F.3d at 537.

Because the district erred in conducting a "sufficiency" analysis after determining that one of Mars' proffered reasons for its actions was not pretextual, I concur in the result reached by the majority.